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Supreme Court of the United States

REBECCA FRIEDRICHS, ET AL.,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF FORMER CALIFORNIA GOVERNOR PETE WILSON, PACIFIC RESEARCH INSTITUTE, AND BIPARTISAN CALIFORNIA EDUCATORS AND SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF FORMER CALIFORNIA GOVERNOR PETE WILSON, PACIFIC RESEARCH INSTITUTE, AND BIPARTISAN CALIFORNIA EDUCATORS AND SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*[1]

Amici are a former Republican governor of California, a non-partisan public-policy organization, and a bipartisan group of California educators and scholars, all of whom have longstanding and deep-rooted interests in California's education system. *Amici* are bound by a common concern that agency shop arrangements—which compel public-school teachers who are not union members to finance unions' collective bargaining activities—have a profoundly detrimental impact on the professional lives of California's teachers, the well-being of California's public-school students, and ultimately the entire public-education system in the State. In *amici*'s view, agency shop arrangements contravene not only sound education policy but also the First Amendment rights of those nonmember teachers forced to

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[1] Pursuant to this Court's Rule 37.3(a), *amici* state that petitioners and those respondents who entered an appearance in the court of appeals (the union respondents and intervenor California Attorney General Kamala D. Harris) have filed letters with the Clerk granting blanket consent to the filing of *amicus* briefs. Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission. No person other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission.

fund the collective bargaining that culminates in these pernicious effects.

Pete Wilson was governor of California from 1991 to 1999, a U.S. Senator from California from 1983 to 1991, and the Mayor of San Diego from 1971 to 1983. Governor Wilson has extensive experience with matters of education policy affected by collective bargaining.

Eric Hanushek is the Paul and Jean Hanna Senior Fellow at the Hoover Institution at Stanford University. He studies educational issues from an economic perspective, and has promoted the idea that teacher proficiency should be measured by increased student achievement.

Peter H. Hanley is Executive Director of the American Center for School Choice. He has three times been elected president of the San Mateo Union High School District Board and is currently board president of Amethod Public Schools, a charter school management organization. He has also served four terms in the California School Boards Association Delegate Assembly.

Pacific Research Institute ("PRI") is a non-profit, non-partisan 501(c)(3) organization that champions individual freedom, opportunity, and personal responsibility through the advancement of free-market policy solutions and private initiative. The PRI Center for Education publishes research and promotes outreach regarding a number of important topics in the education field, including teacher quality, academic standards, school finance reform, and parental choice in education. For example, in March 2002, PRI published a comprehensive study analyzing the collective bargaining agreements used in 460 Cali-

fornia school districts. *See* Pamela A. Riley et al., Pac. Research Inst., *Contract for Failure: The Impact of Teacher Union Contracts on the Quality of California Schools* 1-2 (2002). Based on this analysis, PRI researchers concluded that many of the policies in collective bargaining agreements "erode[ ] the authority of the school board and district management to make important decisions," "harm[ ] teachers," and are "detrimental to student achievement." *Id.*; *see also* Lance T. Izumi et al., Pac. Research Inst., *Not as Good as You Think: Why the Middle Class Needs School Choice* 109 (2007).

A full list of the signatories to this brief is set forth in the Appendix.

In light of their shared goal of improving public education in California, all of the *amici* have a significant interest in the outcome of this case, which presents a First Amendment challenge to agency shop arrangements. Collective bargaining funded by such arrangements "can cover virtually every aspect of what happens within schools," including policies on teacher discipline, assignment, retention, and compensation that provoke heated debate within the teaching profession—as well as among politicians, public-policy experts, taxpayers, and parents—and that can have substantial adverse effects on student outcomes. Terry M. Moe, *Bottom-Up Structure: Collective Bargaining, Transfer Rights, and the Plight of Disadvantaged Schools*, 8 (Sept. 14, 2006) (Educ. Working Paper Archive), *available at* http://files.eric.ed.gov/fulltext/ED508944.pdf. By requiring nonmember teachers to subsidize unions' viewpoints on these public-policy matters—including positions that many teachers believe to be detrimental to their own professional careers and to the

success of their students—agency shop arrangements violate the core First Amendment guarantees that individuals are free to decide "both what to say and what *not* to say," *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988); with whom to associate or not to associate; and whether and how to petition the government. The Court should strike down these coercive union-funding obligations, which infringe upon the First Amendment rights of public-school teachers and imperil the well-being of the students for whom they are responsible.

SUMMARY OF ARGUMENT

I. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court held that a State cannot compel public employees who are not union members to make financial contributions to unions' "political" and "ideological" causes because those mandatory exactions violate the principle, residing "at the heart of the First Amendment," that "one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id.* at 234-35. Because collective bargaining by unions representing public-school teachers is necessarily designed to influence public policy—and is therefore inherently "political" and "ideological"—this aspect of *Abood* compels the conclusion that agency shop arrangements are unconstitutional in the public-school setting. *See* Matthew Blake, Pres., Cal. Fed'n of Teachers, *Teachers Unions Sued over Dues for Political Activities*, Daily Journal (Apr. 8, 2015) ("Every element of public education is political.") (internal quotation marks omitted). The Court in *Abood* nevertheless upheld agency shop arrangements that require nonmember public employees to finance unions' "collective bargain-

ing, contract administration, and grievance-adjustment" activities. 431 U.S. at 225-26.

That conclusion is constitutionally insupportable in any public-employment context, but is especially problematic in the public-school setting. *Abood* failed to recognize the full extent to which teachers' unions advocate positions during collective bargaining on intensely divisive public-policy issues, some of which—from the perspective of nonmember teachers—are harmful to both teachers and students. In addition, the collective bargaining process has direct and often substantial effects on taxes, budgets, and other matters of local governance that are inherently political and ideological in nature. Under *Abood*, nonmember teachers have no choice but to bankroll unions' support for collectively bargained policies to which many nonmember teachers strenuously object as inconsistent with their own beliefs and detrimental to their careers and the well-being of their students.

In particular, school districts and teachers' unions collectively bargain teacher discipline, layoff, assignment, and compensation policies, all of which directly affect teachers' professional lives and students' classroom performance. Compensation for teachers also affects the ability of local governments to provide benefits to other constituencies and salaries to other public employees. Most of these issues are the subject of extensive disagreement among members of the teaching profession, the broader educational community, and the public. For example, many teachers disagree with teacher discipline, layoff, assignment, and compensation policies that operate—either principally or exclusively—on the basis of seniority, without regard to teachers' per-

formance. These policies, in the minds of many public-school teachers, are antithetical to the teaching profession's central mission of "enhanc[ing] the quality of education for students." Cal. Teachers Ass'n, About CTA, Mission Statement, http://www.cta.org/About-CTA/Who-We-Are/Mission-Statement.aspx (last visited Sept. 8, 2015).

Yet, despite the strong opposition of many nonmember teachers to the educational policies that teachers' unions espouse, agency shop arrangements compel nonmember teachers to subsidize unions' collective bargaining activities on these matters as a condition of their public employment. Moreover, these arrangements effectively designate unions as the advocates for the interests of both nonmember and member teachers in negotiations with school districts, even though nonmembers may well have very different views from the unions that they have no means of airing during the collective bargaining process. These intolerable burdens on nonmember teachers' speech, association, and petition rights—countenanced in *Abood* based on reasoning that has failed to withstand the test of time—should be rejected by this Court.

II. According to *Abood*, the "'primary purpose'" of agency shop arrangements—and the reason that the burdens they impose on nonmembers' First Amendment rights can be countenanced—is to prevent nonmember employees from "'free riding'" on dues-paying union members during the collective bargaining process. *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2289 (2012) (citation omitted); *see also Abood*, 431 U.S. at 224. While it is doubtful that a "free-rider" rationale could be a constitutionally sufficient justification for coerced speech, association,

and petitioning in any setting, that rationale is particularly flawed in the public-education context. Indeed, it is far from the case that nonmember public-school teachers necessarily benefit from the policies advocated by teachers' unions during collective bargaining. To the contrary, many teachers—particularly those who perform at or near the top of their profession—are, in fact, *harmed* by the policies that unions advance during collective bargaining.

For example, teachers who are new to the profession or to particular school districts often find themselves at risk of being laid off or involuntarily transferred to another school—even when they have achieved extraordinary success in the classroom—due to provisions in collective bargaining agreements that make important employment decisions dependent primarily, if not entirely, on teacher seniority. Moreover, many union-supported policies make it exceedingly difficult for school districts to discipline underperforming or incompetent teachers, which disincentivizes school district administrators from even initiating disciplinary proceedings. As a result, failing teachers remain in the classroom year after year, and the teachers who teach alongside them are forced to spend valuable classroom time trying to repair the academic damage that these substandard teachers have inflicted on their students.

In addition, "single salary schedules"—another product of the collective bargaining process—require teachers of the same seniority and education levels to be compensated exactly the same as one another, regardless of the schools to which they are assigned, the subject matter that they teach, their effectiveness in the classroom, or their impact on students' achievement. This lock-step compensation model

penalizes teachers in disadvantaged schools and hard-to-staff teaching fields, as well as the most effective teachers, all of whom would be better off under a compensation system designed to reward teacher quality and improve student outcomes.

As a result, the only "free ride" that teachers' unions can conceivably offer to many nonmember teachers is one that takes them further from the destination they aspire to reach—a merit-based teaching profession dedicated, first and foremost, to the well-being and success of its students. Collective bargaining, after all, is not focused on what is best for students, but what is best for the unions themselves. Thus, it is the *unions* that are "free-riding" on the backs of students and non-member teachers—not the other way around. Coerced financial support for public unions, and the infringement on teachers' core First Amendment rights resulting from such coercion, cannot be justified on so flawed a rationale. *Abood* should be overruled.

ARGUMENT

I. COLLECTIVE BARGAINING IN THE PUBLIC-EDUCATION CONTEXT IS INEXTRICABLY INTERTWINED WITH TEACHERS' PROFESSIONAL LIVES, STUDENTS' ACHIEVEMENT, AND NONMEMBERS' FIRST AMENDMENT RIGHTS.

In *Abood*, this Court acknowledged that agency shop arrangements "interfere" with public employees' "freedom to associate for the advancement of ideas, or to refrain from doing so, as [they] see[ ] fit." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977). The Court nevertheless deemed this interference with core First Amendment rights to be justified to the extent that nonmembers' financial contri-

butions are used to fund collective bargaining activities that establish school district policies on "bread and butter" issues like "wages, hours, vacations, and pensions." *Id.* at 258 (Powell, J., concurring). In so holding, however, the Court failed to appreciate the extent to which many of the policies that are established during the collective bargaining process—even those that ostensibly govern the "terms and conditions" of teachers' employment—involve fundamental public-policy issues that heavily influence teachers' professional lives and the achievement of their students, and therefore rest at the very core of teachers' First Amendment interests. *Id.* at 220 (majority opinion).

A. Collective Bargaining In Public Education Is Inherently Political.

School district policies that emerge from the collective bargaining process determine which teachers school districts may hire (or continue to employ) and the schools to which those teachers are ultimately assigned. This, in turn, greatly shapes the quality and equality of students' educational opportunities. *See* Raj Chetty et al., *Measuring the Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood*, 104(9) Am. Econ. Rev. 2633, 2634 (2014) (explaining that teacher effectiveness "has substantial impacts on a broad range of [student] outcomes"); Bill & Melinda Gates Found., *Ensuring Fair and Reliable Measures of Effective Teaching* 5 (2013), *available at* http://www.metproject.org/downloads/MET_Ensuring_Fair_and_Reliable_Measures_Practitioner_Brief.pdf (concluding that "more effective teachers not only cause[ ] students to perform better on state tests, . . . they also cause[ ] students to score higher on other, more cognitively

challenging assessments in math and English"). Agency shop arrangements compel nonmembers to fund unions' views on these policies—despite the detrimental impact the unions' negotiating positions may have on some teachers' professional lives and the well-being of their students.

Discipline Policies. For example, unions commonly negotiate for provisions in collective bargaining agreements that require school districts to overcome a gauntlet of procedural obstacles—verbal reprimands, meetings, notices, and teaching improvement plans—before districts can discipline underperforming or failing teachers. *See, e.g.*, Agreement between L.A. Unified Sch. Dist. Bd. of Educ. and United Teachers L.A., art. X, § 11.0 ("L.A. Agreement") (requiring school district to provide notifications and meetings to underperforming teachers before a notice of unsatisfactory service or act may be issued); Agreement between Oakland Unified Sch. Dist. Bd. of Educ. and Oakland Educ. Ass'n (effective July 1, 2005), art. 25.1.1.1 ("Oakland Agreement") ("Peer assistance . . . must be provided to a [teacher] who has received an overall unsatisfactory evaluation in the areas of teaching strategies and instruction . . . ."); Contract between S.F. Unified Sch. Dist. Bd. of Educ. and United Educators of S.F. (effective July 1, 2012), art. 28 ("S.F. Agreement") (requiring school district to provide verbal reprimands, written reprimands, a statement of incident or misconduct, and a statement of discipline before a teacher may be suspended without pay).

These contractually-mandated steps—which build upon various statutory requirements governing teacher dismissals in California, *see* Cal. Educ. Code §§ 44934, 44938, 44944—can constitute "tortuous"

impediments to an effective disciplinary process, "caus[ing] districts in many cases to be very reluctant to even commence" the discipline of a failing teacher. *Vergara v. California*, No. BC484642, slip op. at 11, 12 (Cal. Sup. Ct. Aug. 27, 2014), *available at* http://goo.gl/ThBjNQ. As one California court recently concluded after a ten-week bench trial, the inevitable result of procedural barriers to teacher discipline is that underperforming or incompetent teachers remain in the classroom year after year, imposing "a direct, real, appreciable, and negative impact on a significant number" of students. *Id.* at 8; *see also id.* at 7 ("[A] single year in a classroom with a grossly ineffective teacher costs students $1.4 million in lifetime earnings per classroom."). Those poorly performing teachers occupy positions that would otherwise be available to highly motivated, entry-level teachers eager to embark on a new career and to create the optimal classroom environment for their students.[2]

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[2] Collective bargaining agreements also establish and regulate district-wide Peer Assistance and Review ("PAR") programs, which provide underachieving teachers with individualized goal-setting plans, mentorship meetings with other teachers, periodic reports and evaluations, and additional professional development activities. *See, e.g.*, L.A. Agreement, art. X-A; Agreement between Sacramento City Unified Sch. Dist. Bd. of Educ. and Sacramento City Teachers Ass'n (effective July 1, 2004), Appx. H; S.F. Agreement, art. 39. Although there is widespread agreement that struggling teachers should receive some measure of assistance, some PAR programs can operate, in practice, to delay the discipline or dismissal of failing teachers who are entirely unable or unwilling to meet basic satisfactory performance standards, and many such programs are overseen and controlled by union officials or their appointees. *See* Lance T. Izumi et al., Pac. Research Inst., *Not as Good as You Think: Why the Middle Class Needs School Choice* 118 (2007).

Layoff Policies. Teachers' unions also frequently advocate, and persuade school boards to adopt, policies requiring district-wide reductions in force to be implemented on the basis of teacher seniority. *See, e.g.*, L.A. Agreement, art. XIII, § 3.6 ("The order of termination within a teaching or service field . . . shall be based on seniority within status . . . ."); Agreement between Bd. of Educ. San Diego Unified School Dist. and San Diego Educ. Ass'n (effective July 1, 2013) ("S.D. Agreement"), art. 19.1.3.1 ("The order of layoff within a service field or teaching subject shall be in reverse order of seniority . . . ."); *see also* Dan Goldhaber & Roddy Theobald, *Assessing the Determinants and Implications of Teacher Layoffs* 3 (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Research, Working Paper 55, 2010) ("[I]n the overwhelming majority of [collective bargaining] agreements, seniority is the determining factor in which teachers are laid off first with 'last hired, first fired' provisions.").

These quality-blind reduction-in-force policies—together with underlying statutory requirements that can be supplemented during the collective bar-

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Thus, in the view of many educators, while PAR programs may have admirable goals and may achieve some measure of success, the time and money that are dedicated to PAR programs would be better spent enriching the lives of students in other ways, particularly because "it takes more resources to serve struggling veterans . . . than new teachers, many of whom are likely to succeed." John P. Papay & Susan Moore Johnson, *Is PAR a Good Investment? Understanding the Costs and Benefits of Teacher Peer Assistance and Review Programs* 13 (2011); *see also* Eric A. Hanushek, *Valuing Teachers: How Much Is a Good Teacher Worth?*, 11(3) Educ. Next 41, 44 (2011) ("[T]here is no substantial evidence that . mentoring programs systematically make a difference in whether teachers are in fact effective at driving student achievement.").

gaining process, *see* Cal. Educ. Code § 44955—result in the termination of countless highly-effective, well-liked teachers and the retention of a disproportionately high percentage of below-average teachers. *See* Goldhaber & Theobald, *supra*, at 2 ("[A] very different group of teachers would be targeted for layoffs under an effectiveness-based layoff scenario than under the seniority-driven system that exists today."); *see also* Raj Chetty & Alex Olssen, *The Impacts of Last-In, First-Out vs. Effectiveness-Based Teacher Layoff Policies* 1 (2013), *Vergara*, No. BC484642, Pls.' Exhibit 9 ("[T]he [reverse seniority layoff] policy ends up laying off many highly effective teachers who would greatly improve their students' performance, while retaining ineffective teachers who would otherwise be laid off under [an effectiveness]-based policy."). Indeed, seniority-driven layoff policies are a barrier to the ability of many newer teachers—including teachers from diverse backgrounds with unique viewpoints—to remain in the public-school teaching profession at all.

It is well-documented that these last-in-first-out layoff policies impose severe and potentially irreparable harm on students. In a recent study, researchers implemented a hypothetical 5% reduction in the teaching force of the Los Angeles Unified School District, and compared the effects of a seniority-based reduction in force (as currently mandated by the District's collective bargaining agreement) to a reduction based on teacher effectiveness. *See* Chetty & Olssen, *supra*, at 1. The results are alarming: a seniority-based reduction in force decreases student test scores by an average of 11 percentile points relative to an effectiveness-based reduction in force, and these test-score decreases translate into a loss in lifetime earnings of $87,000 *per student*. *Id.* at 2-3.

Worse still, minority and low-income students "bear the brunt" of these seniority-driven teacher layoff policies. *Vergara*, No. BC484642, slip op. at 15 (internal quotation marks omitted). Minority and low-income students are assigned to junior teachers at a disproportionately high rate, and are therefore forced to endure a constant "churning . . . of teachers" when district-wide reductions in force become necessary. *Id.*; *see also* Carrie Hahnel et al., Educ. Trust—W., *Victims of the Churn: The Damaging Impact of California's Teacher Layoff Policies on Schools, Students and Communities in Three Large School Districts* 6 (2011), *available at* http://1k9gl1yevnfp2lpq1dhrqe17.wpengine.netdna-cdn.com/wp-content/uploads/2013/10/ETW-Victims-of-the-Churn-Report.pdf ("[A] school in the top poverty quartile . . . is 65 percent more likely to have a teacher laid off than a school in the bottom poverty quartile . . . ."). This relentless revolving door of teachers "greatly affects the stability of the learning process to the detriment of such students." *Vergara*, No. BC484642, slip op. at 15; *see also* Goldhaber & Theobald, *supra*, at 15 ("[T]here are achievement consequences associated with the churn of teachers.").[3]

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[3] In their brief in opposition, the union respondents argued that teacher discipline, dismissal, and layoff procedures are "dictated by statute," and are thus "matters for which the Unions *do not and cannot engage in collective bargaining*." CTA Opp'n at 22-23 & n.13. But respondent California Teachers Association took the exact *opposite* position in a recent filing in the California Court of Appeal, where it claimed that "[n]othing in [California's] statutes dictates which teachers are hired or promoted; whether poor-performing teachers are supported, asked to resign, or terminated; or which teachers are assigned to which students." Opening Br. Intervenors-Appellants CTA &

Transfer and Assignment Policies. Teachers' unions similarly promote and negotiate for teacher transfer and assignment policies that afford preferential treatment to teachers on the basis of district seniority. *See, e.g.*, L.A. Agreement, art. XI, § 6.c ("[W]hen there is an over-teachered condition, the teacher with the least District seniority . . . will be displaced . . . ."); Oakland Agreement, art. 12.4.2 ("[S]eniority . . . shall be given preference in granting an assignment."); S.D. Agreement, art. 12.2.1.1 ("Positions available immediately following the May post shall first be offered in seniority order to qualified unit members . . . ."). In practice, teachers with seniority tend to invoke this preferential treatment in order to transfer to or seek assignments at schools with higher percentages of Caucasian students and/or more affluent students, environments that are perceived as having less difficult working conditions relative to other schools. *See* Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39(2) J. Hum. Resources 326, 328 (2004); *see also* Nicole S. Simon & Susan Moore Johnson, *Teacher Turnover in High-Poverty Schools: What We Know and Can Do* 5-6

Cal. Fed'n Teachers at 48, *Vergara v. California*, No. B258589 (Cal. Ct. App. May 1, 2015), 2015 WL 4977003. Moreover, while California law does impose procedural requirements that school districts must meet before they can dismiss ineffective teachers, *see* Cal. Educ. Code §§ 44934, 44938, 44944, and constrains the ability of school districts to conduct reductions in force in the best interests of their students, *id.* § 44955, in many school districts, collective bargaining results in the imposition of *additional* policies and procedures that are not found in the California Education Code. *See, e.g.*, L.A. Agreement § 11.0; S.F. Agreement art. 28. At most, then, the statutes on which the union respondents rely establish a procedural floor that can be supplemented and heightened by the discipline, dismissal, and layoff provisions in collective bargaining agreements.

(Aug. 2013) (Working Paper, Project on the Next Generation of Teachers, Harvard Graduate Sch. of Educ.), *available at* http://isites.harvard.edu/fs/docs/icb.topic1231814.files/Teacher%20Turnover%20in%20High-Poverty %20Schools.pdf.

Thus, by affording transfer rights to teachers on the basis of seniority, collective bargaining agreements result in a well-documented trend whereby the most experienced teachers transfer from low-income and minority schools to schools that serve primarily Caucasian and affluent student populations. *See* Sarah F. Anzia & Terry M. Moe, *Collective Bargaining, Transfer Rights, and Disadvantaged Schools*, 36 Educ. Evaluation & Pol'y Analysis 83, 93, 97-98 (2014). This, in turn, results in the staffing of a disproportionately high percentage of inexperienced teachers in low-income, minority schools. *See id.* (concluding that seniority-based transfer provisions in collective bargaining agreements result in a 60% increase in the number of inexperienced teachers at disadvantaged schools in large California school districts). Furthermore, because junior teachers are most vulnerable to seniority-based reductions in force, seniority-based teacher transfer policies feed into and exacerbate the churn that is so devastating to California's most disadvantaged schools and students.

Teacher Compensation. Finally, collective bargaining sets school district policy on teacher compensation and has resulted in the near-universal adoption of "single salary schedules"—uniform pay schedules that compensate teachers based almost exclusively on their number of years of teaching experience and level of education. Michael Podgursky, George W. Bush Inst., *Reforming Educator Compen-*

sation 4-5 (2014); Eric A. Hanushek, *The Single Salary Schedule and Other Issues of Teacher Pay*, 82 Peabody J. Educ. 574, 579-82 (2007); *see also, e.g.*, Oakland Agreement, art. 24.2.4 ("All unit members shall advance one step on the salary schedule for each year of service in the District . . . ."); Agreement between San Jose Unified Sch. Dist. Bd. of Educ. and San Jose Teachers Ass'n, art. 36110 ("San Jose Agreement") (stating that teachers' salaries are based on "graduate units" and "years of experience"). Many nonmember teachers, however, profoundly disagree with this "homogenization of public school teachers," which harms teachers and students alike in several significant ways. Podgursky, *supra*, at 7.

"Single salary schedules" equalize teacher compensation regardless of how effective teachers are in the classroom, thereby disincentivizing the very "best people [from] enter[ing] or remain[ing] in the profession" in service of students. Hanushek, *Valuing Teachers*, *supra*, at 44. In contrast, compensation systems that *reward* their most effective teachers have a "selection effect," and draw "teachers into the workforce who are relatively more effective at meeting . . . performance targets" in the classroom. Podgursky, *supra*, at 7. The equalized pay system that arises out of the collective bargaining process therefore "tends to lower overall [teacher] effectiveness" and, as a result, student achievement. *Id.*

"Single salary schedules" do further harm to student outcomes—as well as the ability of school districts to staff their schools in a sensible way—by ignoring the very real differences that exist in school environments and teaching fields. Podgursky, *supra*, at 7. Because all teachers of equivalent seniority and education level are compensated exactly the same,

regardless of the schools or fields in which they teach, teachers are less likely to seek employment in schools with difficult working conditions and in hard-to-staff teaching fields, such as special education, high-school mathematics, and high-school science. *Id.* at 5-7; *see also* Joshua Barnett & Gary W. Ritter, *When Merit Pay Is Worth Pursuing*, 66(2) Educ. Leadership (2008), *available at* http://www.ascd.org/publications/educational-leadership/oct08/vol66/num02/When-Merit-Pay-Is-Worth-Pursuing.aspx ("Because the current system includes no monetary rewards directly tied to effectiveness, many effective teachers seek more 'compensation' through better working conditions, often choosing to leave schools with a high population of disadvantaged students and challenging teaching conditions for schools serving more advantaged students."). This, in turn, leads to unfilled teacher rosters at high-poverty schools, vacancies in hard-to-staff teaching fields, and an ineffective practice of assigning teachers "out of field" or with substandard licenses simply to fill vacant positions. Podgursky, *supra*, at 5-7.

Recent educational reforms instituted in school districts outside California provide concrete evidence of the damage that "single salary schedules" can do to student achievement. For example, in the 2009-10 schoolyear, the District of Columbia Public Schools ("DCPS") eliminated lock-step teacher salaries and implemented a teacher evaluation and compensation policy tied, in large part, to classroom observations of teachers and student test scores. *See* Thomas Dee & James Wyckoff, *Incentives, Selection, and Teacher Performance: Evidence from Impact* 2-3 (Nat'l Bureau of Econ. Research Working Paper No. 19529, 2013). Researchers have found that, in the wake of this reform, low-performing teachers exited the

DCPS in droves and highly-effective DCPS teachers became even *more* effective. *See id.* at 23-24 ("[F]or high-performing teachers, a stronger financial incentive . . . meaningfully improve[d] subsequent teacher performance."); *id.* at 26-29 ("[T]he evidence . . . indicates high-powered incentives linked to multiple indicators of teacher performance can substantially improve the measured performance of the teaching workforce."). And, during the same timeframe, student achievement in the DCPS soared. *See* Umut Özek, *A Closer Look at the Student Achievement Trends in the District of Columbia Between 2006-07 and 2012-13*, at 30 (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Research, Working Paper No. 119, 2014) ("[E]ven when accounting for changes in student demographics, test scores in the District have improved substantially, especially in math.").

* * *

As these examples make clear, the policies that are established during the collective bargaining process have far-reaching consequences for teachers' professional lives and the achievement of the students for whom they are responsible. Indeed, these collectively bargained policies shape virtually every aspect of teachers' and students' day-to-day interactions and classroom experiences. *See, e.g.*, Agreement between Chaffey Joint Union High Sch. Dist. and Associated Chaffey Teachers CTA/NEA, arts. 10.1, 10.5.6.1.1, 11.1, 11.2 (setting policies with respect to parent-teacher meetings, class size, and length of work day). Yet, despite the serious misgivings that many nonmember teachers have about the negative effect of these policies on their own careers and the success of their students, agency shop arrangements compel nonmember teachers to provide

financial support for the unions' positions on these intensely personal, and profoundly important, policy matters.

B. Agency Shop Arrangements Violate Nonmembers' Speech, Association, And Petition Rights.

The "heavy burden" that agency shop arrangements impose on the First Amendment rights of nonmember public-school teachers, *Harris v. Quinn*, 134 S. Ct. 2618, 2643 (2014)—who are compelled to fund bargaining in which unions advocate policies that the teachers may view as detrimental to their own careers and the success of their students—is incompatible with this Court's First Amendment jurisprudence.

Abood itself recognized the severity of this burden, declaring that agency shop arrangements interfere with the "moral" and "religious views," "economic" and "political" beliefs, and "ideological" viewpoints of nonmember employees. 431 U.S. at 222-23. In more recent cases, the Court has repeatedly underscored this "significant impingement on [the] First Amendment rights" of nonmember employees, reiterating that it is equally abhorrent to the First Amendment for the government to "compel the endorsement of ideas" as it is for the government to "prohibit the dissemination of ideas that it disfavors." *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2288-89 (2012).

While *Abood* drew a distinction between union fees used for "political" and "ideological" causes, on the one hand, and "collective bargaining activities," on the other, subsequent decisions have exposed the artificiality and unworkability of that distinction. It

is no longer open to dispute that a "public-sector union takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289; *see also Harris*, 134 S. Ct. at 2632 ("In the public sector, core issues such as wages, pensions, and benefits are important political issues . . . ."). In fact, the President of the California Federation of Teachers recently acknowledged that "*[e]very* element of public education is political." Matthew Blake, *Teachers Unions Sued over Dues for Political Activities*, Daily Journal (Apr. 8, 2015) (emphasis added; internal quotation marks omitted). With respect to each of the policies discussed above—teacher discipline, transfers, assignments, layoffs, and compensation—the objections of nonmember teachers to unions' collective bargaining positions are often based on deeply-rooted personal, political, and ideological concerns, including the impact that such policies will have on their professional lives, the well-being of their students, and, ultimately, the success of the public-education system as a whole. The freedom-of-speech considerations that prompted the *Abood* Court to condemn compelled subsidies for unions' lobbying activities therefore apply with equal force to agency shop arrangements that compel nonmember teachers to fund unions' collective bargaining activities.

In addition, agency shop arrangements impose independent, and equally unacceptable, burdens on nonmember public-school teachers' associational rights and their right to petition the government about matters of public concern. As this Court has recognized, the freedom of association is "crucial in preventing the majority from imposing its views on groups that would rather express other . . . ideas." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48

(2000). And the right to petition—a right that has long been recognized as "among the most precious of the liberties safeguarded by the Bill of Rights," *United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967)—is "integral to the democratic process" and ensures that citizens are free to convey their "special concerns" to the government, *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011); *see also McDonald v. Smith*, 472 U.S. 479, 483 (1985) ("[T]he values in the right of petition as an important aspect of self-government are beyond question . . . ."). Just as the freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), the right of association and the right to petition carry with them concomitant rights to *refrain* from associating with organizations with which one disagrees and from supporting their petitioning efforts. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate.").

Agency shop arrangements, however, compel nonmember public-school teachers to "associate with those who do not share their beliefs" on an array of matters vital to their careers, the well-being of their students, and the success of the public-school system as a whole. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000). These arrangements likewise coerce public-school teachers who elect not to join a union to finance the petitioning activities of unions "with which they broadly disagree" on matters of great "public concern" and to cede their petitioning rights to advocates that are urging different positions from the ones the nonmembers would take if permitted to bargain directly with the school district. *Harris*, 134

S. Ct. at 2623, 2640; *see also City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175-76 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees."). Because individuals must be permitted to express their own "ideas, hopes, and concerns to their government and their elected representatives," *Borough of Duryea*, 131 S. Ct. at 2495, the First Amendment forbids state-sanctioned measures—such as agency shop arrangements—that compel individuals to associate with and finance the petitioning activities of groups that seek to attain goals inconsistent with their own personal beliefs and professional aspirations.

II. THE FREE-RIDER JUSTIFICATION FOR AGENCY SHOP ARRANGEMENTS IN THE PUBLIC-SCHOOL SETTING IS FUNDAMENTALLY FLAWED.

Abood's principal justification for upholding agency shop arrangements—to prevent purported free-riding by nonmembers on unions' collective bargaining efforts—is flawed in multiple respects. As an initial matter, that rationale cannot be reconciled with this Court's subsequent precedent. On multiple occasions, this Court has made clear that the free-rider justification animating *Abood* is "something of an anomaly" and that "free-rider arguments . . . are generally insufficient to overcome First Amendment objections." *Harris*, 134 S. Ct. at 2627; *Knox*, 132 S. Ct. at 2289, 2290.

The free-rider justification is also impossible to square with the real-world implications of compelling nonmember teachers to fund educational policies with which they may vehemently disagree. In fact,

in many settings, the danger that nonmember public-school teachers will "free ride" on unions during the collective bargaining process is wholly illusory because—contrary to the assumptions underpinning *Abood*, 431 U.S. at 221-22—many nonmember teachers do not believe that they "obtain[ ] benefits [from] union representation" during collective bargaining. In fact, many nonmember teachers are manifestly harmed by these collective bargaining activities and are forced to subsidize views contrary to their own professional, economic, ideological, and personal interests.

For example, new, high-performing teachers commonly find themselves at risk of losing their teaching positions, or of being transferred to another school against their will, due to union-backed policies that prioritize teacher seniority above performance in the classroom. *See supra* Part I.A; Terry M. Moe, *Bottom-Up Structure: Collective Bargaining, Transfer Rights, and the Plight of Disadvantaged Schools* 10 (Sept. 14, 2006) (Educ. Working Paper Archive) (explaining that seniority-based transfer provisions establish a "hierarchy among teachers" because "[t]hose with lots of seniority have substantial choice over where they teach, but those who are newer to the district (and probably the profession) may have very little choice indeed, and may find themselves filling slots that senior teachers do not want."); *see also* Bhavini Bhakta, Op-Ed., *California's Pink-Slip Shuffle*, L.A. Times, Dec. 16, 2012, http://articles.latimes.com/2012/dec/16/opinion/la-oe-bhakta-teaching-20121216 (recounting that the author lost her teaching position four times in eight years due to her relative lack of seniority, even though she was named a "Teacher of the Year"). Such policies impair

the ability of motivated, student-focused teachers to progress, or even remain, in their chosen profession.

It should come as no surprise, then, that a significant proportion of teachers (union members and nonmembers alike) do not support many of the policies that are established by their collective bargaining agreements. In fact, a survey of California public-school teachers released last year shows that the majority of teachers believe that teacher morale is negatively affected by reduction-in-force policies that are based, either primarily or solely, on teacher seniority. *See* Students Matter, Vergara v. California *2013 California Educators Survey Results* 17-18 (2014), *available at* http://studentsmatter.org/wp-content/uploads/2014/03/SM_Research-Now-Poll-Results_03.05.14.pdf. These findings are also consistent with the attitudes of the U.S. population as a whole, which overwhelmingly rejects the seniority-based reduction-in-force policies advocated by many unions. *See* Press Release, Greenberg Quinlan Rosner Research, New University of Southern California Dornsife College of Letters, Arts and Sciences/Los Angeles Times Poll (Apr. 10, 2015), *available at* http://www.gqrr.com/articles/2015/4/12/new-university-of-southern-california-dornsife-college-of-letters-arts-and-scienceslos-angeles-times-poll (finding that 92% of respondents in a random survey sample of California registered voters believed that teacher seniority should not be the primary factor dictating teacher layoff order).

Many teachers also oppose teacher discipline policies contained in collective bargaining agreements that can lead to the entrenchment of habitually underperforming teachers in the classrooms next door to them. For many reasons, a significant proportion

of "teachers . . . do not want grossly ineffective colleagues in the classroom." *Vergara*, No. BC484642, slip op. at 12. For example, the continued employment, and inability or unwillingness to improve, of these substandard teachers make it difficult for high-performing teachers to engage in collaborative lesson-planning and co-teaching. *See* Elaine Allensworth et al., Consortium on Chi. Sch. Research, *The Schools Teachers Leave* 25, 30 (2009) (finding that teachers are more likely to remain in schools that have a "shared commitment among the faculty to improve the school" and are more likely to leave when colleagues are "uncooperative and resistant to change"). In addition, students assigned to underperforming teachers fall far behind their peers, which requires high-performing teachers to expend tremendous effort simply trying to bring these students back up to grade level.

Moreover, highly-effective teachers routinely find that their excellence in the classroom is not adequately recognized in the compensation that they receive. That undercompensation is a product, at least in part, of the "single salary schedules" that unions and school districts adopt during the collective bargaining process. *See* Daniel Weisberg et al., The New Teacher Project, *The Widget Effect* 6 (2009) ("Fifty-nine percent of teachers . . . say their district is not doing enough to identify, compensate, promote and retain the most effective teachers."). Many teachers desire professional acknowledgment and compensation commensurate with their achievements, rather than a system that treats all teachers as interchangeable parts. *See id.*; *see also* Lance T. Izumi et al., Pac. Research Inst., California Education Report Card 92 (2007), *available at* https://www.heartland.org/sites/all/modules/custom/h

eartland_migration/files/pdfs/20907.pdf ("A uniform salary structure with automatic non-performance-based pay raises does not provide a good basis for recruitment of better teachers, nor does it help increase the achievement of students."). By failing to distinguish among teachers, "single salary schedules" deny outstanding teachers the recognition and compensation that they so justly deserve. *See* Barnett & Ritter, *supra* ("[U]nder a merit-based [compensation] scheme, the most effective teachers would consistently earn large bonuses . . . .").

In short, many nonmember public-school teachers do not want, need, or seek out a "free ride" that will continue to deliver them the status quo—a system that prioritizes the needs of more-senior teachers (regardless of their performance level) at the expense of newer, higher-performing teachers and the students for whom they are responsible. Instead, these nonmember teachers hold the "deeply rooted" belief that these employment-related decisions should be based on teachers' "individual merit or achievement," and that an education system founded on merit-based principles will ultimately benefit all students. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360-61 (1978) (Brennan, J., concurring in part and dissenting in part).

CONCLUSION

This Court should overrule *Abood* and hold that agency shop arrangements violate public-school teachers' First Amendment speech, association, and petition rights.

Respectfully submitted.

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September 11, 2015

APPENDIX

APPENDIX OF SIGNATORIES

Gary Beckner is Executive Director of the Association of American Educators, an alternative, non-union professional organization of teachers that provides liability insurance and other benefits to teachers who do not want to join their union.

Alan Bonsteel is a physician and long-time public proponent of school choice, who is president and founder of California Parents for Educational Choice ("CPEC"). He is author of *A Choice for Our Children: Curing the Crisis in America's Schools* (1997).

Mark Bucher is President of the California Policy Center and an attorney who has been active in public policy since 1993, particularly with respect to Proposition 174 (school choice) and Proposition 226 (union use of dues for political purposes).

Sandra Crandall, twice elected, is a member of the Fountain Valley School District Board of Trustees in Orange County, California. Mrs. Crandall was an elementary teacher for 39 years, a recipient of the Fountain Valley School District Teacher of the Year in 2005, and was an agency fee payer.

Lydia Grant is a California parent activist who helped get the California "Parent Trigger" law off the ground. She is a member of the board for Parent Revolution, the Education Chair for the Saving Los Angeles Project, and a Los Angeles City Commissioner on the Board of Neighborhood Commissioners. Ms. Grant also served as the Education Representative for the Sunland-Tujunga Neighborhood Council.

Peter H. Hanley is Executive Director of the American Center for School Choice. With extensive policy and business experience, he has three times been elected president of the San Mateo Union High School District Board and is currently board president of Amethod Public Schools, a charter school management organization. He has also served four terms in the California School Boards Association Delegate Assembly, and has pressed for academic reform and accountable professional development, among other initiatives.

Eric Hanushek is the Paul and Jean Hanna Senior Fellow at the Hoover Institution at Stanford University. He studies educational issues from an economic perspective, and has promoted the idea that teacher proficiency should be measured by increased student achievement. He is a graduate of the Air Force Academy and has a Ph.D. from MIT.

Victoria Heggem is a teacher in Arcadia, California, and board member of California Teachers Empowerment Network ("CTEN"), a non-profit, non-union information resource for teachers interested in education reform. She is a "religious objector" pursuant to a provision in California law that allows individuals who object to unions on religious grounds to have their compulsory union dues paid to an eligible charity.

Darren Miller is a high school math teacher in suburban Sacramento and a board member of CTEN. He previously served as a school site union representative, but currently rejects union membership and is an agency fee payer. He has maintained

"Right on the Left Coast," a successful blog, for over 10 years.

Pacific Research Institute ("PRI") is a non-profit, non-partisan 501(c)(3) organization that champions individual freedom, opportunity, and personal responsibility through the advancement of free-market policy solutions and private initiative. PRI believes that free interaction among consumers, businesses, and voluntary associations is more effective than government action in providing good schools, quality health care, a clean environment, and economic growth. PRI's activities include publishing books and studies, giving commentary to media, providing legislative testimony, hosting public events, and conducting grassroots and community outreach.

Larry Sand is President of CTEN and a well-known education-reform activist. Mr. Sand is a retired teacher who began his teaching career in New York in 1971. Beginning in 1985, he taught elementary school as well as English, math, history and ESL in the Los Angeles Unified School District, where he also served as a Title 1 Coordinator.

Pete Wilson served as the 36th governor of California (1991-1999), a United States Senator (1983-1991), the Mayor of San Diego (1971-1983), and a California State Assemblyman (1967-1971). As governor, he won—against the opposition of California's teachers' unions—a rigorous upgrade of public-school curricular standards and legislation enabling the creation of charter schools, reducing class size to 20 in K-3 grades, and implementing statewide standardized testing in grades 2-11. He is a Distinguished

Visiting Fellow of the Hoover Institution and sponsored three (ultimately unsuccessful) efforts to enable school voucher programs and Propositions 226, 75, and 32 (seeking to repeal extractions of involuntary political contributions from teachers' union dues and non-member agency fees).